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IN THE
# Supreme Court of the United States
OCTOBER TERM, 1988

THOMAS V. MACNAMARA,
*Cross-Petitioner*

v.

KOREAN AIR LINES,
*Cross-Respondent*

## BRIEF IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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### REASONS FOR DENYING THE CROSS-PETITION

### I. ALTHOUGH THIS CASE IS APPROPRIATE FOR REVIEW BY THE SUPREME COURT, CROSS-PETITIONER HAS PRESENTED THE WRONG QUESTION FOR REVIEW CONCERNING THE FRIENDSHIP, COMMERCE AND NAVIGATION TREATY WITH KOREA.

Cross-Petitioner is correct that the decision by the Third Circuit is in conflict with the decisions of the Second,

Fifth and Sixth Circuits.[1] All four courts have taken different approaches and reached different conclusions on the degree to which the employment clause[2] of the Friendship Commerce and Navigation (FCN) Treaty with Korea insulates a Korean company from liability under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, or the Age Discrimination in Employment Act, 29 U.S.C. § 626 (ADEA).

In this Court, Cross-Petitioner phrases the issue as whether the Korean FCN Treaty can be construed in a manner consistent with Title VII and the ADEA. By trying to harmonize the Treaty with domestic law, this approach does violence to both the text of the Treaty and the general principles of international law for construing treaty rights.

In *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982), this Court recognized that the FCN treaties were designed to assure foreign companies the right to conduct business in the host country without suffering discrimination based on their alienage. 457 U.S. at 188.

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1. Wickes v. Olympic Airways, 745 F.2d 363 (6th Cir. 1984); Speiss v. C. Itoh & Co. (America), Inc., 643 F.2d 333 (5th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982); Avaglianov. Sumitomo Shoji America, Inc., 638 F.2d 552 (2d Cir. 1981), *vacated on other grounds*, 457 U.S. 176 (1982). Technically, there may be no direct conflict because this case deals with the Korean FCN Treaty, 8 U.S.T. 2217, T.I.A.S. No. 3947 (1957), while the other cases dealt with the Greek and Japanese treaties, respectively. In Sumitomo, this Court implied that similar wording among various FCN treaties might not be controlling because of their different negotiating histories. 457 U.S. at 185 n.12. The relevant portions of the Korean and Japanese treaties are identically worded, while the wording of the Greek Treaty differs substantially. *See id.* at 181 and n.7.

2. The employment clause of the Korean Treaty is contained in Article VIII(1) and provides, in relevant part, that "[n]ationals and companies of either Party shall be permitted to engage within the territories of the other Party, . . . executive personnel . . . of their choice." 8 U.S.T. 2217, T.I.A.S. No. 3947 (1957).

The treaties accomplished this by granting foreign corporations "national treatment" in most respects. That is, foreign corporations would be treated no less favorably than domestic corporations. *Id.* at n.18. "National treatment" is by definition a contingent standard whose contours may be determined only by an examination of how the host country treats its own citizens. H. Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice,* 5 Am. J. Comp. L. 229, 232 (1956).

Article VIII(1), the provision at issue here, is not cast in contingent terms. It thus goes beyond assuring national treatment by providing foreign companies certain rights regardless of whether the same rights are granted to the host country's own companies. The drafters of the treaties had the vision to recognize that, when dealing with the right to select executives to manage and control operations in the host country, unequal treatment is sometimes necessary to assure an equal result. As this Court recognized in *Sumitomo,* because subsidiaries enjoy all of the rights of domestic corporations, "[t]he only significant advantage branches may have over subsidiaries is that conferred by Article VIII(1)." 457 U.S. at 189.[3]

By asking whether Article VIII(1) can be construed in a manner consistent with domestic anti-discrimination law, Cross-Petitioner is implicitly denying the noncontingent status of Article VIII(1). The scope of a treaty right which is not contingent on the treatment accorded to domestic companies or other foreign companies cannot be determined by regard to domestic employment statutes. Treaties are to be construed expansively in favor of the rights that they create, *Asakura v. City of Seattle,* 265 U.S. 332, 341 (1924), not restrictively to serve the purpose of some other domestic law.

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3. Subsidiaries are locally incorporated under the domestic law of the host country and may be owned in whole or in part by foreign nationals. Branches are outposts of the foreign company.

The question is thus not whether the Treaty *can* be construed to be consistent with domestic antidiscrimination laws, but whether it *should* be construed in that manner.

American companies operating abroad and foreign companies operating in the United States under the protection of FCN treaties need a clarification of the relationship between their treaty rights and the obligations of domestic employment discrimination laws. As this Court noted in *Sumitomo,* the issues raised "are clearly of widespread importance." 457 U.S. 182 n.7. At the same time, the question proffered by the Cross-Petitioner is not the one that the Court must resolve in order to clarify the law.

## II. CROSS-PETITIONER'S ATTACKS ON THE THIRD CIRCUIT'S OPINION ARE WITHOUT SUFFICIENT MERIT TO JUSTIFY REVIEW BY THIS COURT.

### A. *Homogeneous Populations*

Cross-Petitioner complains that the Court below denied him the opportunity to proceed on a disparate impact theory of liability. As the Third Circuit noted, for corporations from countries whose populations are largely homogeneous, statistical disparities can produce findings of liability when the foreign company does no more than exercise its Treaty right to prefer its own citizens for executive positions in the host country.

While citizenship may be technically distinct from national origin, *Espinoza v. Farah Mfg. Co.,* 414 U.S. 86 (1973), the correlation of these two factors will almost always produce a statistical disparity when a Korean corporation selects a Korean citizen over an American.[4] A similar statistical disparity on the ground of race will almost always

4. Less than 0.2 percent of all Americans in 1980 were from Korean descent or national origin. Bureau of the Census, Statistical Abstract of the United States, (109th ed.) at Table 45 (1989).

appear when a Korean corporation selects a Korean citizen over a person who is non-Asian.[5] Statistically significant disparities may also appear for other prohibited categories.[6]

The Court of Appeals was therefore correct to conclude that allowing a disparate impact theory would make illegal conduct that the Treaty admittedly protects. Cross-Petitioner argues that proof of disparate impact should be allowed because the treaties were intended to prevent the imposition of ultranationalistic policies, and the antidiscrimination laws do not fall within this category. Yet, what to one nation is progressive social policy may be viewed as discriminatory in another. Not so many years ago, female protective laws were upheld in this country as progressive. *Muller v. Oregon,* 208 U.S. 412, 421-23 (1908). *Cf. California Federal S & L Assn. v. Guerra,* 479 U.S. 272 (1987). Today they are seen as paternalistic, disabling laws which

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5. As of the 1930 census, less than 1.5 percent of all persons in the United States are Asian, while nearly 100 percent of all persons in Korea are Asian. *Compare id. with* The World Almanac & Book of Facts (1988 ed.) at 692.

6. The population of Israel is approximately 83 percent Jewish, while less than 3 percent of all persons living in the United States are Jewish. *Compare* The World Almanac & Book of Facts (1988 ed.) at 688, *with* Bureau of the Census, Statistical Abstract of the United States, (109th ed.) at Table 81 (1989). Selection of an Israeli citizen over a non-Jew will likely lead to a statistical case of religious discrimination against an Israeli company. Spain and Italy are likewise predominantly Catholic compared to the United States which is 27 percent Catholic. *Compare* The World Almanac & Book of Facts (1988 ed.) at 689 and 719, *with* Bureau of the Census, Statistical Abstract of the United States, (108th ed.) at Table 75 (1988). Even with regard to age, statistical disparities are quite possible because many countries have mandatory retirement laws or do not prohibit mandatory retirement, thereby skewing the age distribution of their executive level workforce.

prevent women from enjoying full equality.[7] If Korea were to pass a law similar to Title VII prohibiting national origin discrimination and allow a disparate impact model of proof, no American firm could avoid liability if it hired an American citizen to run its Korean branch, unless of course that American was of Korean ancestry. Such a result would undermine the very right that the Treaty sought to protect.[8]

Cross-Petitioner also urges that disparate impact analysis should be permissible because at the time the treaties were adopted (1) various states had antidiscrimination laws, and (2) the State Department assured Congress that the treaties would not interfere with these laws. There are two answers to this. First, the assurances by State Department representatives were limited to advising Congress that the treaties would not permit discrimination *among* American citizens, Hearing Before the Committee on Foreign Relations, United States Senate, 84th Cong., 2d Sess., July 3, 1956 at 2, and that there were no "innovations in the [Korean] treaty raising problems of domestic law." Sen. Ex. Rep. No. 5, 85th Cong., 1st Sess. (1957) at 6, 13-14. Contrary to the Cross-Petitioner's suggestion, at no time did the State Department advise Congress that the Korean Treaty would not impact upon state antidiscrimination laws when a foreign company filled one of its executive positions with a Treaty Trader. Nor was there any such assurance when

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7. In Britain, the Law against Sex Discrimination does not make it unlawful for an employer to permit women employees to leave five minutes before the men. Such a rule has been held to reflect mere "chivalry" rather than discrimination. Peake v. Automotive Products, Ltd., 1 All E.R. 106 (Q.B. 1978). Korean law prohibits women from engaging in night work, Labor Standards Act, Article 56. Until 1985, Japan had such a law applying to women executives. Japan, Labor Standards Law, Law No. 47 of 1947.

8. A similar result would occur in any country whose citizens are substantially homogeneous with regard to any category covered by Title VII or the ADEA.

Congress considered the identically worded treaty provision with Japan.

Second, when the Korean FCN Treaty was negotiated (1954-1957) there was no accepted theory of disparate impact proof of discrimination. At the federal level there was no Title VII. Although there were a few laws at the state level prohibiting employment discrimination, there was no case law even articulating the disparate impact theory.[9]

B. *The Right To Engage*

Cross-Petitioner next claims that the Treaty right to "engage" executive personnel did not carry with it the right to terminate the same employee. This contention is without merit. As this Court observed in *Carlucci v. Doe,* ____ U.S. ____, 109 S.Ct. 407, 102 L.Ed.2d 395, 403 (1988), as a matter of statutory interpretation, "absent a 'specific provision to the contrary, the power of removal from office is incident to the power of appointment.' *Keim v. United States,* 177 U.S. 290, 293 (1900)." Any other result would deny a foreign corporation the right to manage and control its branch operation as protected by Article VII of the Treaty and would force it to maintain redundant positions, thereby creating the same effect as a percentile law, which all agree, the Treaty was designed to obviate.

C. *The Relevant "Executive"*

In the Court below, Cross-Petitioner conceded that when his job was eliminated, his responsibilities were assigned to Korean Air Lines' district manager in Washington, D.C., Wan Gin Chung, and that Mr. Chung was an executive within the meaning of Article VIII(1). It was not disputed that Mr. Chung held an E-1 Treaty Trader visa,

9. More than four years after the Korean FCN Treaty had been ratified, there had been fewer than 20 court actions out of more than 19,000 cases under the fair employment laws and ordinances in the 12 states surveyed by the House Committee on Education and Labor through the end of 1961. H.R. Rep. 1370, 87th Cong., 2d Sess. (1962) at 7.

and that following the reorganization, Mr. Chung directed Korean Air's operations from Pennsylvania to Florida.

The Third Circuit held that the executive position held by Mr. Chung which remained after the reduction in force was the relevant job for determining executive status under the Treaty. Cross-Petitioner claims that the focus should have been on his job as district manager in Philadelphia before the reorganization, and that he was not an executive. The Third Circuit had it right.

The employment rights contained in Article VIII(1) of the Treaty are an "elaboration of the principles of control and management set forth in Article VII" and serve as "a corollary to the right of control by emphasizing the freedom of management to make its own choices about personnel."[10] Among other things, they were designed to overcome "percentile laws" under which a proportion of jobs in particular categories would be reserved for host country nationals. If a country could limit the ability of a foreign corporation to consolidate its domestic operations, the host country could severely limit the ability of the foreign firm to control and manage its investment. If, in the process of reorganizing, a corporation had to retain unnecessary or redundant jobs, the effect would be identical on an economic level to that created by percentile laws. The Third Circuit was therefore correct in focusing on the overall responsibilities of the "chosen" executive.

D. *Discovery Questions*

In the Court of Appeals, Cross-Petitioner complained about not having received certain discovery responses relevant to his own status as an executive prior to having to respond to a motion for summary judgment. The Court of

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10. Foreign Service Despatch No. 2529 from the U.S. Commissioner for Germany (HICOG) to the Department of State, March 18, 1954, discussing the identical language of the FCN Treaty with the Federal Republic of Germany.

Appeals quickly dismissed his contention by noting that the discovery in question was not directed to the responsibilities of Mr. Chung (A-12 at n.5). Here, Cross-Petitioner complains that he was denied the opportunity to take the deposition of his successor, Wan Gin Chung.

The District Court set a discovery deadline of October 15, 1983, which was later extended to November 15, 1983. It was not until May 15, 1984, fully six months after the discovery cutoff, that the request was made to depose Mr. Chung. Having failed to comply with the district court's discovery order, Cross-Petitioner cannot complain now that he was improperly prevented from taking the deposition of Mr. Chung.

## CONCLUSION

Although this case is appropriate for review by certiorari, the question presented by Cross-Petitioner is misfocused, and his complaints about the Third Circuit's decision are insubstantial. Accordingly, the Petition For A Writ Of Certiorari should be granted and the Cross-Petition should be denied.

Respectfully submitted,

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